No. 2690.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. WOODLAND GATES,
Appellant,

vs.

COLUMBIA-KNICKERBOCKER TRUST COMPANY, a Corporation, Trustee,
Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal From the District Court of the United States for the District of Nevada

SWEENEY & MOREHOUSE
and W. W. GRIFFIN,
Solicitors for Appellant.

Filed this.....day of March, A. D. 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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PLAINTIFF'S REPLY BRIEF

Upon Appeal from the United States District Court for the District of Nevada.

Replying to paragraph I of the brief of counsel for the Columbia - Knickerbocker Trust Company, appellee, there is one thing that stands forth pre-eminently, and that is, that Gates made the fund the proceeds of which the appellee, Columbia-Knickerbocker Trust Company, is now trying to get hold of.

But for Gates' professional efforts and labor there would have been no "480 acres of land situated in Nevada" now sold, and which is alleged to be the property of Pacific Reclamation Company; and had there been no land there would have been neither fund nor money for the appellee to get its hand on.

On page five of its brief, appellee seems to take the position that Gates' services merely resulted in the protection of an existing right, and not in an actual recovery of land. This is a misstatement of the facts appearing in the petition. The fact is that the Reclamation Company had no title when Gates was employed, by virtue of Section 452, Revised Statutes, which prohibits employees of the land office from making applications for public land.

There is also another misstatement upon this question at pages 12 and 13 of appellee's brief. It is said there that the land office merely *suggested* the irregularity of the application in regard to Section 452. This is not true. The Commissioner actually rendered a decision adverse in character to the application. The Commissioner decided that the above section left him without any discretion; so that it cannot be said that there was an existing title at the time Gates was employed.

The case of *Holmes* vs. *Waymire,* 9. Am. & Eng. Anno. Cases 624 and notes, cited by counsel in appellees' brief, cannot afford any great comfort to him. In the first place, the Kansas statute differs materially from the Nevada statute; and secondly, in the case at bar there is a "fund," and a large one, now in the hands of the District Court of the United States for the District of Nevada—a fund the money proceeds of which—being the proceeds of the 480 acres of land referred to in the complaint in intervention of Gates—is all that there is to fight over.

The Nevada statute says "the attorney has a lien

. . . on any decision in his client's favor and *the proceeds thereof* in whosesoever hands they may come." The proceeds have come into the hands of the lower court and are still there in sufficient quantity to protect Mr. Gates.

Surely there was a decision in the General Land Office and the Department of the Interior in favor of the Pacific Reclamation Company—*Gates' client*—inasmuch as Gates' petition in intervention so alleges and it must be taken as true for the purposes of this appeal.

It has been held in *Kappler* vs. *Sumpter,* 33 Appeal Cases (D. C.), at page 408, that if the attorney could not recover his fee in the Interior Department he could do so by action in another court having jurisdiction in the premises. Why not, then, in the District Court of the United States for the District of Nevada, where the fund or money, the proceeds of the 480 acres of land, now is? Has not that court jurisdiction in the premises?

Counsel seeks to sustain his attitude by

Plummer vs. *Great Northern Ry. Co.,* 110 Pac. 989; 31 L. R. A. (N. S.) 1215.

but the case is not in point, because in the case at bar there was certainly a *decision* in the Pacific Reclamation Company matter and a recognized decision of the General Land Office and the Department of the Interior; else there could not have been any land, and consequently not any fund or money, in the hands of the Pacific Reclama-

tion Company prior to the institution of the suit of *Gutman et al.* vs. *Pacific Reclamation Company.* THERE WAS A DECISION IN FAVOR OF THE PACIFIC RECLAMATION COMPANY, AND SUCH A DECISION AS WOULD BRING GATES' CLAIM WITHIN THE EQUITABLE CONTROL OF THE DISTRICT COURT OF THE UNITED STATES FOR NEVADA, UNDER THE STATUTES OF THAT STATE.

In *Deering* vs. *Schreyer,* 52 N. Y. S. 203, there was *no cause of action to enforce which an action had* been commenced. In the case at bar Gates began an action before the General Land Office to obtain the land and to secure it to the Pacific Reclamation Company.

There is merit, we, too, respectfully suggest in the quotation of counsel from *Haley* vs. *Eureka Co.,* 21 Nev. 127, cited in counsel's brief at page 11, and certainly in the case at bar there was a legal prosecution by a party complainant (the Pacific Reclamation Company) to obtain a *decision* of the General Land Office and the Department of the Interior *"in relation to some right claimed to be secured or some remedy claimed to be given by law to the party complaining."*

Indeed, contrary to views of counsel for the appellee, expressed on page 12 of their brief, we contend that in so far as the Pacific Reclamation Company is concerned, Gates' services did create the land

and added intrinsic value to the land created. A careful reading of the proceedings as set forth in the Gates Bill in Intervention will convince this Court as to the righteousness of Gates' claim.

Strange, too, that counsel inadvertently perhaps, on page 14 of his brief, admits "that notwithstanding it is quite probable that service may have materially tended to increase the market value of the land." What land? we ask. It must needs be the 480 acres secured to the Pacific Reclamation Company through Gates' efforts.

We contend, too, that the lien to Gates was given by the provisions of section 6376 of 2 Rev. Laws of Nevada, 1912 (Civil Practice Act, sec. 434).

It may not be amiss to enlarge somewhat upon the subject.

That Equity has jurisdiction to enforce liens, whether on real or personal property, is clear.

> 2 Story Eq. Jur., Sec. 1216;
> 1 Whit. and T. Lead. Cases Eq. 1108, Note to *Cuddy* vs. *Rutter.*

The foregoing doctrine stands approved in the case of

> *Hooly Mfg. Co.* vs. *New Chester Water Co.,* 48 Fed. Rep. 891.

In *Fletcher* vs. *Morey,* 2 Story 555, 565, Judge Story said "In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem,* not only against real estate but upon

personal estate or upon money in the hands of third persons," etc., and this doctrine was affirmed in

Tuttle vs. *Claflin,* 88 Fed. Rep. 122.

A case not dissimilar in principle to the Gates case is *Needles et al.* vs. *Smith et al.,* 87 Fed. Rep 316, in which it is held that Attorneys have a lien "superior to the claim of one to whom such securities are afterwards pledged to secure a lien."

It is not disputed and cannot be that the land obtained through the efforts of Gates for the Pacific Reclamation Company was afterwards pledged as security for a mortgage to the Columbia-Knickerbocker Trust Company, appellee here.

In *Funk* vs. *McComb,* Judge Dallas cites approvingly the opinion of Lord Kenyon in *Read* vs. *Dupper,* 3 Term R., page 361, in which that distinguished jurist observes:

> "The principle by which this application is to be decided was settled long ago, viz.: that a party should not run away with the fruits of the cause without satisfying the legal demands of his Attorney, by whose industry and in many instances, at whose expense, those fruits are obtained."

The principle thus enunciated has now been established for about a century longer than when Lord Kenyon referred to it as having been settled long ago and is at this date so fully recognized as not to be open to question.

60 Fed. 488.

To the same effect is *Mahone* vs. *Tel. Co.,* 33 Fed. Rep., pages 704, 705.

Counsel for appellee throughout the proceedings in the Court below and here seek to impress the fact that "the legal services for which the claim to a lien upon land is invoked, were not associated with any action or special proceeding in any Court of Justice." (See appellee's brief, page 11.)

That that argument will not hold has been settled by many cases, the most important of which are *Stanton et al.* vs. *Embrey, Administrator,* 93 U. S. at page 566, and *McGowan* vs. *Parish,* 237 U. S. at page 285.

In the former case, services were rendered by Robert J. Atkinson, in his lifetime, as Attorney for the defendants, in prosecuting a claim in their behalf against the United States before the accounting officers of the Treasury Department, and the plaintiff instituted the suit in the Supreme Court of the District to recover compensation for those services since the decease of the intestate. These services were not associated *with any action or special proceeding in any Court of Justice.* The proceeding was before the officers of the Treasury Department just as the proceeding in the Gates case was before the officers of the Interior Department. In that case the Court, speaking through Mr. Chief Justice Clifford, said:

> "Professional services (before the Treasury Department or other departments) to prepare and advocate just claims for compensation, are as legitimate as services rendered in Courts in

> arguing a case to convince a Court or jury that the claim presented or the defense set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to expect such employment, and to receive compensation for other services."

In McGowan against Parish, McGowan sought to establish and enforce a lien upon a fund for services in prosecuting what was known as the "ice claims" before Courts. The Court observing that "a Court of equity should do justice completely and not by halves, and should retain the cause for all purposes even though it be thereby called upon to determine legal rights otherwise beyond its authority;" held that McGowan, who had rendered substantial services, was entitled to his compensation therefor.

In Wylie against Cox, 15 Howard 415, the Supreme Court says:

> "Professional services were rendered by an attorney, in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the Attorney was to receive five per cent of the amount recovered. Valuable services were rendered by the Attorney during the lifetime of the claimant; but he died before the claim was allowed. Subsequently, the efforts of the Attorney were successful; and he demanded the fulfillment of the contract, which was refused by the administration of the decedent. Payment being refused, the Attorney brought suit; and this Court held that the decease of the owner of the claim did not dissolve the contract, that the claim remained a lien upon the money when recovered, and that a Court of equity would exercise juris-

> diction to enforce the lien, if it appeared that equity could give him a more adequate remedy than he could obtain in a Court of law."

In the case of Ingersoll against Coram, Robert G. Ingersoll, or rather Mrs. Ingersoll, acting after his death, sought to enforce a lien against the distributive share of an heir in the hands of an administrator. In the case at bar, Gates seeks to enforce a lien on land or money in the hands of a Receiver.

The Supreme Court, in the Ingersoll case, speaking through Justice McKenna, said:

> "On the merits there are two proposition: (1) Did the complainant establish the existence of a debt due from Coram and Root to Ingersoll? (2) Did she establish the existence of a lien? As to the first proposition the Court held that:
>
> "The evidence leaves no doubt that it (the result in the case) was brought about 'by the force, effect and stress' of the contest and by the services, which it is admitted Ingersoll rendered."

In the case at bar the services alleged by Gates in his appeal must, for the purpose of this appeal, be considered as admitted. As to the second point, the Court held that the arrangement between Ingersoll and Coram served to stamp the agreement in issue as declaring a purpose to create a lien. There can be no doubt that the agreement between Gates and the Pacific Reclamation Company in regard to the services which Gates was to perform, and *thereafter did perform,* before the General Land Office and the Department of the Interior served to stamp the agree-

ment in issue as declaring a purpose to create a lien. This same doctrine is upheld in *In re Paschal* in which it was held that in accordance with the prevailing rule in this country Paschal had a lien on the fund for disbursements and professional fees.

The case was cited in *McPherson* vs. *Cox,* 96 U. S. 404, and the doctrine repeated, and also in *Central Railroad* vs. *Pettus,* 113 U. S. 116, and in other cases.

In the *Central Railroad* vs. *Pettus,* 113 U. S., the Supreme Court of the United States, speaking through Mr. Justice Harlan, observed:

> "An equitable lien may also arise in the absence of an expressed contract out of general considerations of right and justice, based upon these maxims which lie at the foundation of equitable jurisprudence."
>
> 25 Cyc. 667.

Unless the statute expressly forbids it, the jurisdiction of equity lies for the purpose of granting relief under any circumstances.

> Pomeroy's Eq. Jur., Vol. 1, Section 279;
> *Greil Bros. Co.* vs. *City of Montgomery,* 182 Ala. 291.

As to paragraph II, of Appellant's Brief, we contend that we filed, as we had a right to do, a second or amended Petition in Intervention and that the Second or Amended Petition was accepted and received by the lower Court, as such.

> See transcript, page 58, "The Court."

A careful reading of it will show that the Second Petition in Intervention was an amended Petition and that it contains several paragraphs which were not included in the original Bill.

See transcript, page 33.

We respectfully submit, therefore, that the "Motion to Strike" should have been overruled, and that the order appealed from should be set aside.

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